



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

March 18, 2016

Memorandum for: Deputy Commissioner, Trials

Re: **Detective Mark Scarlatelli**
Tax Registry No. 937502
Narcotics Borough Staten Island
Disciplinary Case No. 2014-12709

Sergeant Steven Marshall
Tax Registry No. 938942
121 Precinct
Disciplinary Case No. 2014-12710

The above named members of the service appeared before Assistant Deputy Commissioner Nancy R. Ryan on June 3, 2015, and were charged with the following:

DISCIPLINARY CASE NO. 2014-12709

1. Said DETECTIVE MARK SCARLATELLI, on or about December 26, 2013, at approximately 20:00 hours while assigned to the NARCBSI and on duty in the vicinity of [REDACTED], Richmond County, did wrongfully use force against HASSAM KHAN, in that he pushed Mr. Khan's head against a car, without sufficient legal authority.

P.G. 203-11

USE OF FORCE

DISCIPLINARY CASE NO. 2014-12710

2. Said DETECTIVE STEVEN MARSHALL, on or about December 26, 2013, at approximately 20:00 hours while assigned to the NARCBSI and on duty in the vicinity of [REDACTED], Richmond County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched the vehicle in which HASSAM KHAN and SYED ALI were occupants, without sufficient legal authority.

P.G. 203-10, Pages 1, Paragraph 5

**PUBLIC CONTACT –
PROHIBITED CONDUCT**

DETECTIVE MARK SCARLATELLI
SERGEANT STEVEN MARSHALL

DISCIPLINARY CASE NO. 2014-12709
DISCIPLINARY CASE NO. 2014-12710

In a Memorandum dated January 11, 2016, Assistant Deputy Commissioner Nancy R. Ryan found Detective Scarlatelli Not Guilty of the sole Specification in Disciplinary Case No. 2014-12709 and found Sergeant Marshall Guilty of the sole Specification in Disciplinary Case No. 2014-12710. Having read the Memorandum and analyzed the facts of this matter, I approve the findings for Detective Scarlatelli, and I approve the findings, but disapprove the penalty for Sergeant Marshall.

Having considered the totality of issues and circumstances in this matter, Sgt. Marshall's otherwise good service and performance record with the Department, along with commendable comments offered about him by his Commanding Officer, I deem that a lesser penalty is warranted for Sergeant Marshall. Therefore, Sergeant Marshall is to receive a Reprimand as a disciplinary penalty.


William J. Bratton
Police Commissioner



POLICE DEPARTMENT

January 11, 2016

MEMORANDUM FOR: Police Commissioner

Re: Detective Mark Scarlatelli
Tax Registry No. 937502
Narcotics Borough Staten Island
Disciplinary Case Nos. 2014-12709

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P.G. 203-11 - USE OF FORCE

Disciplinary Case No. 2014-12710

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P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT-PROHIBITED
CONDUCT

The Civilian Complaint Review Board (CCRB) was represented by Heather Cook, Esq., Respondent Scarlatelli was represented by James Moschella and Respondent Marshall was represented by John D'Alessandro, Esq.

Respondents through their counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2014-12709

Respondent Scarlatelli is found Not Guilty.

Disciplinary Case No. 2014-12710

Respondent Marshall is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The CCRB's Case

CCRB called Hassam Khan and Syed Ali as witnesses.

The Respondents' Case

Respondents testified on their own behalf.

FINDINGS AND ANALYSIS

It is undisputed that on December 26, 2013, at about 2000 hours, Hassam Khan was driving his cousin Syed Ali's new Mercedes Benz on the Staten Island Expressway service road. Ali was in the passenger seat.

Respondents Scarlatelli and Marshall, while traveling on the service road of the Staten Island Expressway, observed the Mercedes accelerate at a high rate of speed, nearly striking a minivan that was in front of it. (Tr. 80). According to the officers, the vehicle repeatedly cut in and out of travel lanes then swerved to avoid another vehicle while making a left into an exit ramp and accelerated again. (Tr. 80, 118). Khan stated that he stayed in one lane at all times but acknowledged that he was speeding. (Tr. 35-36). APU counsel, at trial, conceded that he may have been recklessly driving (Tr. 176) and presented no contradictory evidence.

The officers determined that there was probable cause to arrest Khan because of "the reckless driving, the high rate of speed, and just the erratic driving that he was conducting." (Tr. 122). Respondents followed the vehicle in their unmarked police van with the lights on, ultimately cutting off the Mercedes and stopping it in front of Khan's home at [REDACTED]. Respondents and Sergeant Ryan got out of their vehicle and Respondent Marshall pointed his firearm at Khan and Ali. Both were instructed to show their hands. Respondent Marshall holstered his firearm once Khan showed his hands. (Tr. 81). Khan was unable to produce his driver's license and admitted that it was inside his home. (Tr. 19-20).

There are different accounts as to what happened next. Khan testified that Respondent Scarlatelli tried to open his locked door and when Khan unlocked the door, Respondent Scarlatelli pulled him out of the car, pushed him against the roof of his car and “took my head and slammed it directly into the roof.” (Tr. 17-18, 42-43). Khan denied resisting in any way and denied turning toward or speaking to Respondent Scarlatelli, further asserting that he did “not at all” delay in following any of the officer’s commands. (Tr. 36, 43).

Khan further testified that he saw his teeth, “flying out of my mouth . . . ,” “onto the roof,” and that his two front teeth were broken as a result of the force. (Tr. 18, 44-45). He stated that he did not cry out or experience any pain at the time. (Tr. 46). There was no bleeding, the now-broken front teeth did not feel loose in his mouth, and there were no injuries to his nose or chin. (Tr. 48-49). He stated that there was no bruising, swelling, cuts or lacerations. (Tr. 50).

Khan recounted that Respondent Scarlatelli then patted him down, asked him to walk to the back of the car and then, while he and his cousin were at the back of the car, the officers searched the car. (Tr. 20). Khan was arrested and received medical attention for two chipped teeth. (CCRB Ex. 1).

Respondent Scarlatelli testified that when he and Respondent Marshall first approached the Mercedes and gave verbal commands for Khan and Ali to show their hands, only Ali immediately complied and that Khan didn’t show his hands for 15-20 seconds, but then complied. (Tr. 122). Ali got out of the car as ordered. Respondent Scarlatelli opened the driver’s side door and Khan grabbed onto his seatbelt, “very irate, asking why we stopped him.” (Tr. 123-24). Respondent Scarlatelli further testified that

he then reached over, took it off Khan and physically pulled him out of the car by his arm, using "the amount of force necessary to get him out of the seat . . . and outside the car." (Tr. 125, 141).

He explained that he then attempted to turn Khan around to give him a pat down and place his chest up against the car but he was "flailing around . . . wasn't fighting, just very, very . . . aggressive towards me." (Tr. 125). He contended that Khan was yelling and repeatedly tried to spin back around to face Respondent Scarlatelli as he tried to do the pat down, and further noted that his hands were "all around" and "nothing was in control." (Tr. 127). He further recounted, with regard to the pat-down attempt, that "nothing worked because he kept turning around and getting in my face." (Tr. 126). Scarlatelli stated that he was eventually able to grab Khan and bring him to the back of the car where together he and Marshall placed him in handcuffs. (Tr. 127).

Respondent Scarlatelli denied slamming Khan's head against the car and said he did not see Khan's mouth make contact with the roof of the car. (Tr. 126). He agreed that he pushed Khan up against the car "with his [Khan's] back" but further denied grabbing Khan by the hair or the back of his head. (Tr. 126, 129). He contended that he was not angry during the encounter. (Tr. 140, 144). He acknowledged noticing "a little chip in the front" of Khan's teeth after he was handcuffed. (Tr. 158-59).

The other two people who testified about this period of time were Respondent Marshall and Ali. Respondent Marshall confirmed Respondent Scarlatelli's account concerning Khan's lack of compliance with exiting the vehicle and his removal from the car, noting that he observed Respondent Scarlatelli "get his arm to remove him from the vehicle." (Tr. 82). He further recounted that an irate, cursing Khan swung his arms back

around multiple times and “refus[ed]” to be frisked. Respondent Marshall stated that he did not, at any point, observe Respondent Scarlatelli slam Khan’s face into the car. (Tr. 83)

In Ali’s testimony, he confirmed that he got out of the car on the passenger’s side when he was ordered to do so and that he observed Khan being pulled out of the car on the driver’s side. (Tr. 59). He stated that Khan placed his hands on the car’s rooftop after he was pulled out. Ali recounted that he then saw the officer push Khan’s head towards the rooftop and bang his head. (Tr. 59). He contended that he saw Khan’s mouth make contact with the roof of the car. (Tr. 73). He did not, however observe teeth flying out of Khan’s mouth. (Tr. 74).

Ali said that after he and Khan were brought to the back of the car, he told Khan that his teeth were broken; to which Khan replied, “They broke my teeth?” (Tr. 61). He further explained, “that’s where he noticed that okay, now they broke my teeth because he couldn’t - - because – I don’t know if he felt it at the time but he was just like stone.” He stated that Khan did not appear to be in any pain. (Tr. 73).

Other evidence submitted in the case were photos Khan described as showing his chipped teeth (CCRB Ex. 2A and 2B), taken the morning after the incident (Tr. 25), and marks his teeth allegedly left on the Mercedes’ roof. (CCRB Ex. 3A, 3B, and 3C).

Disciplinary Case No. 2014-12709 (Wrongful use of force by Respondent Scarlatelli)

The question before this tribunal is two-fold – whether Respondent Scarlatelli was justified in using force at all and whether the amount of force used was excessive under

the circumstances. Under P.G. 203-11, members of the service at the scene of a police incident are to use only "minimum necessary force." Respondent does not dispute that he placed his hands on Khan and used force to remove him from the vehicle or that he attempted to get Khan to turn around and stand against the vehicle for a pat-down. It is the CCRB's burden to prove, by a preponderance of the evidence, that the force used that was used was unnecessary, excessive or both.

I find that Respondent Scarlatelli was justified in using force to effectuate the arrest and conduct a pat-down. In making that finding, I credit the Respondents' testimony that there was probable cause to arrest Khan for reckless driving, noting that Khan corroborated their statements that he was speeding. As Respondent Scarlatelli was placing Khan under arrest, he was therefore authorized to use minimum necessary force to conduct a pat-down or frisk of Khan and to handcuff him. As such, Respondent was permitted to pull a resisting Khan from the car and to push him against the vehicle to pat him down.

Determining whether the use of force was excessive in this situation is a question of credibility given the starkly different accounts of the events provided by Respondent and Khan. If Khan is to be believed, he was attempting to comply with all directives from the police officers when Respondent pulled him out of the car and slammed his head onto the roof. (Tr. 3-4). If Respondent is to be believed, he used only the force necessary to gain compliance from an individual who was resisting arrest and any injury to Khan's teeth was incidental.

Determination of which account to accept in this case depends almost exclusively on an evaluation of witness credibility. The trier of fact may take into account a wide

range of factors, including but not limited to, witness demeanor, corroborating evidence, the consistency of a witness account both at trial and over time, the degree to which the witness is interested in the outcome of a case, the potential prejudice or bias of the witness, and perhaps most basically the degree to which the witness accounts are logical and comport with common sense and general human experience.

It is possible that Khan chipped his teeth during this police encounter. I find, however, that Khan's testimony as to the excessive force he alleges was used by Respondent Scarlatelli to be incredible and unsupported by the evidence. Most glaring is the lack of corroborative physical or medical evidence indicating that excessive force was used. Khan claims Respondent took his head and slammed it directly into the roof of car with such force that caused his front teeth to "fly out" of his mouth. Yet, he claims he felt no pain at all and did not cry out. He further asserted there was no blood, bruising, swelling, cuts, lacerations, injuries or other signs of trauma to his cheek or face. (Tr. 50). Both the arrest photo taken a few hours after the incident and the photos taken by Khan's relative the next morning and entered into evidence by the CCRB confirm the same. (CCRB Exs. 2A-2B; Respondent's Exhibit ("RX") A).

Khan's hospital records confirmed that there was no injuries to the areas around the teeth. The injury was described as "upper mid teeth chipped," more specifically "an Ellis II fracture consist[ing] of loss of enamel (the outer surface of the tooth) and exposure of the dentin." (CCRB Ex. 1 at MR 16-17). Radiology tests revealed "no acute intracranial abnormality" as to Khan's head and "no evidence of acute traumatic injury" to his facial bones." (*Id.* at MR 13). Khan was simply advised to follow up with dentistry. (*Id.* at MR 14).

Also telling is the fact that Khan apparently did not report any head trauma to the emergency room physician. The report lists the presenting problem as a “toothache” and states that Khan reported chipping his teeth “when he was arrested this evening.” (CCRB Ex. 1 at MR 17). No mention was made of the alleged trauma to the head. In sum, it strains credulity to believe that had Khan’s head had been “slammed . . . directly” into the roof of the car as he described, he would have felt no pain and there would have been no indicia of damage or trauma beyond two chipped teeth. Quite simply, Khan’s description of the cause of injury is highly unlikely.

Additionally, there is insufficient evidence in the record to conclude that the photos of the car roof introduced by the CCRB support Khan’s description of what happened. For example, there was no explanation that the marks in Ex. 3 A, B, and C correspond to the actual position of Khan’s teeth. Khan’s own unsupported assertions that the marks “match . . . up” to his teeth (Tr. 46-47) are not enough, particularly because the marks are at questionable angles. A mere visual inspection of the photos does not convince this tribunal that the marks match the size or spacing of Khan’s teeth. In addition, there is a space in between the alleged markings where there is no apparent damage to the car’s finish. This tribunal would need an explanation of why there are no markings in the precise area where the teeth supposedly hit and broke off from the impact.

I also note, as a factor in assessing Khan’s credibility, that Khan currently has a lawsuit pending against Respondent Scarlatelli concerning this incident and is seeking monetary compensation from the officers and the City. He therefore has a financial interest in the outcome of this case. I am unpersuaded by the APU’s argument that

because Khan's parents gave him a Mercedes as a teenager, and because he is educated and employed, he therefore must not be motivated to sue the City for money. (Tr. 186). It is a fact that Khan opted to file a civil lawsuit seeking monetary damages. While it is his right to do so, the pending lawsuit is a source of potential bias and creates incentive to embellish and exaggerate Respondents' actions. As such, his testimony must be carefully scrutinized with this in mind. I find his credibility does not hold up to such scrutiny given the lack of corroborative medical and physical evidence discussed above.

The testimony of Syed Ali also does little to enhance Khan's credibility. As a preliminary matter, I note that Ali is not a neutral observer. Ali is Khan's cousin. They were at a family party together and it was Ali's car that Khan was driving when he was stopped by police. It is not unexpected or surprising for Khan and Ali to have discussed the events of December 26, 2013, in connection with the pending civil and disciplinary actions and to relay similar accounts as to what occurred.

Moreover, Ali actually says very little about what occurred. He testified that Khan was speeding (Tr. 66), in contrast with his statement to CCRB investigators in February 2014 that Khan was not speeding. (Tr. 67-69). He stated that he observed Khan being "pulled out" of the vehicle and the officer pushing his head, "bang[ing] [it] onto the . . . rooftop." (Tr. 59). He said nothing about whether Khan refused to get out of the car that would possibly help explain why Khan was pulled from the car while Ali was allowed to simply exit on his own. Further, though he claimed on cross examination he saw Khan's mouth make contact with the roof he also stated that he "was unable to see . . . across the car" and did not observe Khan's teeth falling out of his mouth. (Tr. 60, 73-

74). He agreed that Khan exhibited no pain at the time and that there was no blood. (Tr. 73-74).

In all, the testimony of Khan's cousin provides this tribunal with little more than two cousins agreeing that Khan's head was pushed into the roof of the car by Respondent Scarlatelli. Given the family relationship between Ali and Khan and the lack of specific, corroborative details provided by Ali, his testimony does not factor heavily into this tribunal's analysis.

Having examined the case presented by the CCRB, I next look to the testimony of Respondents. Respondents Scarlatelli and Marshall testified that Khan was non-compliant, refused to exit the vehicle by grabbing onto his seatbelt and was irate, flailing his arms and repeatedly swinging his body around to face Respondent Scarlatelli as he attempted to pat him down. (Tr. 82-85, 123-27). As they testified in a straightforward manner and were not shown to have any personal bias against Khan, I credit their testimony.

There is no credible evidence that the force used, at any point during this encounter, was excessive under these circumstances. Respondent Scarlatelli's counsel concedes that Khan's tooth may well have been inadvertently chipped during the incident as a result of his refusal to comply with Respondent's directives. (Tr. 168). Both officers observed Khan's chipped teeth after he was in handcuffs. Khan's account of how his teeth came to be chipped has been deemed not credible for the reasons outlined above. As such, I find the CCRB has failed to meet its burden of showing excessive force.

That burden, however, does not then shift to Respondent to explain how the teeth were chipped nor is it the task of this tribunal to speculate as to same. I find that any damage to Khan's teeth, if such damage in fact occurred during his arrest, was likely the incidental result of Respondent Scarlatelli trying to attain a resisting Khan's compliance, rather than Khan's discounted assertion that as Khan attempted to comply with his directives, Scarlatelli purposefully slammed his head into the car causing his teeth to "fly out of his mouth." *See Case No. 81716/06* (September 28, 2006) (finding that an injury to complainant's head was the "incidental" result of her non-compliance with a police directive to get down, and not the result of excessive force); *Case Nos. 80418/04 & 80419/04* (November 28, 2005) (finding no excessive force where a complainant initiated a physical struggle and resisted arrest upon being awoken at the end of the subway line and sustained bruising as a result of the struggle).

As the CCRB failed to prove that the force used was unnecessary and excessive, Respondent Scarlatelli is found Not Guilty.

Disciplinary Case No. 2014-12710 (Search of vehicle without sufficient legal authority)

Ali testified that Respondent Marshall (he was described as the Respondent who pulled the gun) searched through the car. (Tr. 62). Khan also testified that he saw the officers going through the car. (Tr. 20).

Respondent Marshall stated that he did not put his hands under the seats but merely put his hands around the seat cushion that is adjacent to the armrest where the seat belt lock is. (Tr. 113). Based on his own description, this constitutes a search of the vehicle. Respondent Marshall's reasons for conducting the search were that when Khan

was moved to the rear of the vehicle with Scarlatelli and Ryan he looked in the vehicle where Khan was sitting, "to make sure there was no weapon; and if there was... so I could secure it so that he couldn't get access to it if it was there." (Tr. 83). Respondent Marshall added that because Khan didn't want to show his hands initially it, "raised up the hair on the back of my neck." (Tr. 100).

As an initial matter, I do not find this part of Respondent Marshall's account credible. I first note that if he indeed conducted this search to see if Khan had secreted a weapon in his driving area during the time they couldn't see his hands, then it would be only logical that he would have searched under the driver's seat as well. However, he claims he simply felt around the seat cushion adjacent to the armrest, hardly a thorough search for a weapon.

More problematic is the fact that Respondent Marshall's description of his search is directly contradicted by Respondent Scarlatelli's description of the search which he gave during his CCRB interview and confirmed in this case. Respondent Scarlatelli testified that Respondent Marshall searched the whole front seat area of the car on both the drivers and passenger's sides. (Tr. pp. 155-56). I find Scarlatelli's description of the search more plausible as an officer looking for a weapon would likely search more thoroughly than the cursory search Marshall claims to have conducted.

While Respondent Marshall is not credible as to what he did inside the car, the crucial factor in determining whether Respondent is guilty of this Specification concerns the timing of the search. See *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (holding that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is

within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest).

As Respondent Scarlatelli testified, at the time Respondent Marshall searched the car, both occupants were at the rear of the car with him and Sergeant Ryan and Khan was not going to be allowed back into the car in any event. (Tr. 156).

In addition, there was no reason to go into the car for evidence since Khan was arrested for reckless driving and, as Respondent Marshall testified, when the car stopped Khan had already committed the reckless driving. (Tr. 104); *see Gant* 556 U.S. at 343 ("In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence."). Respondent Marshall therefore had no justifiable reason to conduct the search of the car at that time and is Guilty of this Specification. *See Disciplinary Case No. 2005-80852* (December 09, 2005) (finding a search unlawful where there was no threat that the arrestee could still access a weapon or possible evidence within the vehicle).

PENALTY

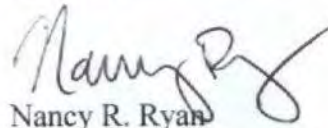
In order to determine an appropriate penalty, Respondent Marshall's service record was examined. *See Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent Marshall was appointed to the Department on July 11, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent Marshall has been found guilty of conducting a car search without sufficient legal authority. The CCRB has recommended a penalty of five vacation days

for this act of misconduct. This recommendation seems reasonable. *See Case No. 2013-10071* (Feb. 19, 2015), in which a 13-year police officer who had no prior disciplinary record forfeited five vacation days for searching a vehicle without sufficient legal authority.

Accordingly, it is recommended that Respondent Marshall forfeit a penalty of five vacation days.

Respectfully submitted,



Nancy R. Ryan

Assistant Deputy Commissioner – Trials



From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT STEVEN MARSHALL
TAX REGISTRY NO. 938942
DISCIPLINARY CASE NO. 2014-12710

Respondent Marshall received a rating of 4.0 “Highly Competent” on his last three performance evaluations. He has been awarded six medals for Excellent Police Duty. [REDACTED]

[REDACTED] Respondent Marshall has no prior formal disciplinary record.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner – Trials